EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Williams	**v**	**M&G Plc**

Heard at: London Central (by video)

On: 4 April 2024

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: in person

For the Respondent: Mr C Boyle, of counsel

JUDGMENT having been announced to the parties at the hearing on 4 April 2024, and having been sent to the parties on 11 April 2024, and written reasons having been requested by the respondent on 11 April 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background, Issues and Evidence

1. By a claim form dated 21 September 2023, the claimant presented a complaint of wrongful dismissal (notice pay). The claimant contends that the respondent dismissed him without notice or pay in lieu. The respondent contends that the claimant was not dismissed but resigned with immediate effect to avoid having to go through a disciplinary process and potentially being dismissed for gross misconduct, and therefore was not entitled to be paid for his notice period.

2. For the hearing, the parties submitted a bundle of documents containing 131 pages. There were three witnesses: the claimant, and for the respondent – Mr Stephen Cumberpatch ("**SC**"), at the relevant time the claimant's direct line manager, and Ms Alix Muir ("**AM**"), employee relations case adviser. All witnesses gave sworn oral evidence and were cross-examined.

3. Mr Boyle, who appeared for the respondent, provided written opening submissions, which he then supplemented by oral closing submissions. The claimant appeared in person and made his submissions orally.

The Facts

4. The respondent is an organisation engaged in the provision of financial services throughout the United Kingdom and abroad.

5. The claimant commenced his employment with the respondent on 28 July 2021 in the role of Regional Account Manager.

6. In April and May 2023, the claimant was subject to the respondent's disciplinary process on the allegation of falsifying a Salesforce (a customer relations management system) record by stating that he had had a meeting with a customer in person, when, in reality, the meeting did not take place. This was classed as gross misconduct, and the claimant was facing a potential sanction of dismissal.

7. The claimant admitted the allegation, but in mitigation stated that it was a one-off incident that was caused by a breakdown in his mental health.

8. On 31 May 2023, the respondent decided that the claimant was guilty of gross misconduct. However, in the light of the mitigating factors, the respondent decided not to dismiss the claimant, but to issue a final written warning to be kept "live" for 12 months.

9. On 15 June 2023, the claimant was due to attend a business seminar. Later that day, SC was contacted by Mark Sangster (the organiser of the seminar), who informed SC that the claimant had cancelled his attendance at 7:20am and had not showed up.

10. SC emailed the claimant asking why he had not attended the seminar. The claimant replied that his car had had a blow out a couple of miles from his house.

11. SC then contacted the respondent's fleet management department to check the records. It transpired that the claimant had not contacted the respondent's road assistance company (Zenith), and there were no records of the claimant's car tyre being changed.

12. On 16 June 2023, SC called the claimant and asked him to explain that. The claimant said that he had used his friend's garage and paid for the new tyre

himself. SC asked the claimant to send a photo of the new tyre and the receipt. The claimant said that he could not send them immediately because of his son's birthday. He said that it would be awkward for him to do that because his mother was in the house.

13. Later that evening, at 17:48, the claimant sent to SC a picture of tyre notice, which was not a receipt. He also sent a photo of the tyre itself, which SC thought did not look like a new tyre. When, in a subsequent conversation, SC pointed all that out to the claimant, the claimant said that he would not be sending a receipt because he was not going to make an expense claim for the tyre and that he paid for the tyre in cash.

14. SC followed up his investigation and spoke again with the claimant on 19 June 2023. SC took notes of his calls with the claimant on 16 and 19 June and sent them to the claimant to check and query if anything there was incorrect. The claimant did not query anything in the SC's notes.

15. SC eventually decided that the claimant had invented the blown tyre as a reason to justify his non-attendance of a work event. On 23 June 2023, SC contacted AM for advice on how to proceed. It was decided that there was a disciplinary case to answer, because, in the respondent's view, the allegations were serious and concerned the claimant's integrity and possible breaches of regulatory conduct rules and the respondent's code of conduct and policies.

16. On Friday, 30 June 2023, SC had a further call with the claimant about this incident. SC took a detailed note of the call. SC explained that in the light of the gaps in the claimant's story he would be required to attend a disciplinary hearing on Thursday, 6 July 2023.

17. The claimant asked SC about the option of resigning. SC told the claimant that there were four options. The SC note records this exchange as follows:

    "• SW asked if he could resign, SC explained the possible outcomes 1) no case to answer and he continues his day job 2) we may seek further investigation 3) Due to the FWW then dismissal 4) SW could decide that he wants a new challenge outside of M&G
    • SC said that we have the Academy on Tuesday and he was still welcome to attend, if he decided that he would rather not attend and instead prepare for Thursday's meeting then this was fine and the business would not hold this against him. SW understood this and would let SC know on Monday his plans.
    • SW said he would think about the whole situation over the weekend and call SC Monday morning."

18. On Wednesday, 5 July 2023 at 12:31pm, the claimant called SC and said he had decided "*to hand in [his] notice*". SC told the claimant to email the resignation notice to him and that he would send an email to HR and "*stick [the claimant] on garden leave*." SC said that the claimant did not need to do any work and that he would give the claimant "*an out of office to stick on [the claimant's] email"* and "*one for [the claimant's] voice mail and phone*". SC

said that he would send the out of office notice to the claimant and the claimant should enable it "*from tomorrow morning*".

19. SC asked the claimant to explain why he acted the way he did with the tyre incident. The claimant said that he wished it had never happened, but nothing could be changed, and he just needed to "*crack on*". SC's note records: "*SC said it through now (resignation)*".

20. Shortly after that, SC sent the claimant a WhatsApp message with out of office instructions. The message said: *"Steve, further to our conversation, can you please add the below as an out of office internal and external. You will need to adjust the date range for say 6months".*

21. During that conversation on 5 July, it was not expressly said by either SC or the claimant that the disciplinary process against the claimant would end with him going on garden leave. However, SC evidence (which I accept) is that it was his understanding at the time of the conversation that the claimant would be allowed to sit out his notice on garden leave and be paid at the end of it, and that the disciplinary process against the claimant would end. It was also the claimant's understanding and the principal reason why he had decided to resign.

22. On the same day, 5 July, the claimant sent his resignation notice. The notice said:

    "I will like this letter to inform you of my resigning from M&G Pru.

    I have enjoyed my time here and appreciate working with you best wishes for the future.

    I look forward to speaking with you and sorting the technicalities."

23. SC forwarded the claimant's resignation letter to HR.

24. On 6 July 2023 at 10:52am, AM spoke with SC and told him that for the claimant to avoid the pending disciplinary process against him he would need to resign with immediate effect and cannot be placed on garden leave.

25. SC then called the claimant and left a voice mail to say that the claimant would not be placed on garden leave and his resignation would be treated as him having resigned with immediate effect. SC then emailed the claimant confirming the same.

26. That email was initially drafted by AM, saying:

    "Resignation Acknowledgement - P3001870
    Thank you for your email dated 5th July 2023 tendering your resignation from the role of Regional Account Manager.

In line with your contract of employment, you are required to give M&G plc 12 week's notice to end your employment, however given your decision to resign prior to the disciplinary hearing due to take place on 6th July 2023, I am willing to accommodate your request to end your employment with immediate effect. As a result, your employment and all associated benefits will end on 5th July 2023."(emphasis added)

27. Before sending the email to the claimant, SC corrected it to read:

"Resignation Acknowledgement - P3001870
Thank you for your email dated 5th July 2023 tendering your resignation from the role of Regional Account Manager.
In line with your contract of employment, you are required to give M&G plc 12 week's notice to end your employment, however given your decision to resign prior to the disciplinary hearing due to take place on 6th July 2023, your employment and all associated benefits will end on 5th July 2023." (emphasis added)

28. SC sent that later version of the Resignation Acknowledgement to the claimant on 6 July 2023 at 15:12. AM then, at 16:36, sent an email to the claimant, explaining that she was supporting SC in the process. She said that it was "*unfortunate*" that the claimant had been provided "*with incorrect information in relation to a garden leave period, however under the circumstances we would not allow garden leave as an option, nor would that be our standard practice."*

29. The AM's email went on to say that because the claimant had resigned one day before the disciplinary hearing, "*therefore to forgo the planned you resign from immediate effect."* And should the claimant wished to "*redact*"[1] his resignation, "*then the disciplinary hearing [would] continue as planned.*" AM asked the claimant to confirm that he no longer wished to resign and instead wished to continue with the disciplinary hearing.

30. The claimant replied at 17:28. He pointed out that he had made a verbal and written agreement with SC to the effect that he would resign and serve his 12-week notice on garden leave. He said that the agreement must not be broken under any circumstances. The claimant refused to retract his resignation notice.

31. On 7 July 2023, AM replied. She said that the respondent recognised that the claimant had been given incorrect information by SC, that the respondent would be "*happy to honour the garden leave period*", however that would not stop the disciplinary process, and the claimant would still be required to attend the disciplinary hearing. AM said that the claimant had two options: (1) commence garden leave and come to the disciplinary hearing, re-scheduled for 12 July, at 10am; or (2) resign with immediate effect, and that will put an end to the disciplinary process. ("**the 2 options email**") The claimant replied

[1] Although it was not put to AM at the hearing, I take it that she meant "retract".

that he would consider his next steps over the weekend and respond on Monday.

32. On Monday, 10 July 2023, the claimant emailed AM, saying that having taken legal advice his position remained that he had made agreement with SC that he would serve out his notice on garden leave and asking AM to confirm that the agreement would be honoured.

33. On 11 July 2023 at 9:36am, Jenifer Carr, the respondent's manager, who had been appointed to hear the claimant's disciplinary, emailed the claimant about technical arrangements for his disciplinary hearing on 12 July. The claimant replied at 15:02, stating that he was in dispute with the respondent about the process. He also said that if he finally decided to attend the meeting, he would need representation, which would take a couple of days to arrange.

34. On the same day, the respondent sent the claimant a letter under signature of SC stating:

"Dear Stephen

We are issuing this letter as we have been notified you are due to commence a period of Garden Leave. We want to take this opportunity to remind you of the conditions which will apply during Garden Leave, as set out in your contract of employment.

The conditions which will apply during Garden Leave are as follows:

• Any accrued holiday entitlement and any holiday entitlement which continues to accrue, shall be deemed to be taken by you during the garden leave period;
• You will be expected to attend your ongoing disciplinary hearing, currently scheduled for Wednesday 12th July 2023

[…]"

35. AM responded to the claimant's 15:02 email at 15:16, referring to her "2 options email" of 7 July and stating that because the claimant had decided to commence garden leave the disciplinary meeting would go ahead, and that he had been given the required 3-day notice of the meeting. AM said that her understanding was that there was no dispute because the claimant had been granted his request for garden leave, "*albeit it continuing to attend your disciplinary hearing.*"

36. The claimant wrote back at 15:30, stating that the dispute was about the agreement he had made with SC and that his understanding was that upon handing in his resignation notice the disciplinary process would discontinue and that he would be allowed to serve his notice on garden leave.

37. AM responded at 15:40, again referring the claimant to her "2 options email" of 7 July and asking the claimant to confirm whether he would be attending the disciplinary meeting the following morning.

38. At 16:13, the claimant wrote back, again emphasising his agreement with SC. He said:

"*The conversation with Steve Cumberpatch was straight forward. I hand in my notice and the disciplinary process would end. Steve then rightly or wrongly also agreed to me having my garden leave. The whole point of me handing in my notice was the the disciplinary process would end, very straight forward. The fact that Steve didn't follow the process is not of my concern, we had an agreement. […]*"

39. At 16:47, AM replied:

"It is still the company's expectation for you to attend your disciplinary hearing as you remain an employee of M&G. As I explained previously, the garden leave period does not stop the disciplinary proceedings. As discussed in my email on the 7th of July, the disciplinary proceedings would only have ceased if you resigned with immediate effect. I believe that this has been made clear to you on several occasions, again I would like to reiterate that Stephen Cumberpatch did not confirm that the disciplinary would cease upon garden leave starting.
Please can you confirm whether you will be attending tomorrows hearing. Please note that nonattendance may result in a decision being made in your absence. […]"

40. At 17:22, the claimant wrote back:

"Hi Alix,
Then please stand by my notice being handed in and employment with M&G ceasing as of 5th July.
There has been some misunderstandings (being generous) but to suggest that was not the agreement with Steve Cumberpatch is simply untrue.
I spoke to Steve which you were not part of and talked with him on 2 separate occasions about handing in my notice and what that would mean (Friday 30th June and Wednesday 5th July).
It was made clear to me by Steve that by handing in my notice the disciplinary process would end. We discussed this.
He then set out the terms of me leaving M&G on 5th July in an email with no mention at all of the disciplinary process (because he believed that it had ended) it stated that I would be put on Garden Leave until the end of my notice period with no caveats.
He then changed his mind and sent a email on July 6th (after my notice being handed in and the terms of my exit agreed) saying that I had left the company with immediate effect. With no offer to continue the disciplinary process.
However, this broke the agreement that me and Steve made which I excepted that in good faith.
To be clear Steve told me that by handing in my notice the disciplinary process would end. This was always the case.
It is clear Steve had no idea how the process worked. However this is not my concern we had an agreement and he broke that agreement.
I have no idea why this is so difficult my only explanation is you are covering each other's backs which is a very sad situation.
Can you confirm who the head of HR is at M&G and please confirm who HR report is it the CEO/COO."

41. On 12 July 2023 at 8:52am, Angela Macdonald (an employee relations adviser) emailed the claimant, stating that in AM's absence, she was writing to accept the claimant's resignation with immediate effect. She said that the claimant last day of employment *"will therefore be 5th July 2023 and all pay and benefits will cease from this day."*

42. Under the terms of the claimant's contract of employment, both sides required to give 12-week notice to terminate it. The terms provided:

*"**Resigning***
[…]

In some circumstances your manager may not require you to work some or all of your notice period and may decide to pay you in lieu. If this is the case, your benefits and pension contribution will terminate on your last working day. Alternatively your manager may put you on garden leave for the duration of your

notice period. During this time you are not required to come into the office regularly but may be required to complete certain projects and to attend meetings as necessary. During a period of garden leave you will continue to be paid as normal and are expected to use up any outstanding holiday owed to you. You are not permitted to work for another employer during this time."

43. The contract terms also allowed the respondent to terminate the claimant's contract with immediate effect by payment in lieu of notice.

"***Termination***

[…]

v) Instead of requiring you to continue performing duties and the Company providing you with duties during any un-expired period of your employment the Company may, at its sole discretion, by written notice elect to terminate your employment with immediate effect, to be followed by a payment of basic salary only (excluding any benefits including bonus or commission), which sum may be paid in instalments, for such un-expired period (whether originally notice was given by the Company or you), less such deductions as required by law."

44. The respondent did not pay the claimant for his notice period.

The Law

Wrongful dismissal

45. A dismissal by the employer in breach of contract, whether constructive or express, gives rise to an action for wrongful dismissal at common law.

46. Under section 3(2) of the Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623, employment tribunals have jurisdiction to consider a contractual claim where the claim arises or is outstanding on the termination of the employee's employment and relates to any of the following: (i) a claim for damages for breach of the contract of employment or other contract connected with employment; (ii) a claim for a sum due under such a contract; or (iii) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract. Accordingly, claims for wrongful dismissal (notice pay) fall within the employment tribunal's jurisdiction.

Constructive dismissal

47. In *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the Court of Appeal held that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*"

48. For the employee to show that he was constructively dismissed, he must prove that:

    a. there was a fundamental breach of contract on the part of the employer,
    b. the employer's breach caused him to resign, and
    c. he did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

49. In *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* 1997 ICR 606, HL, the House of Lords confirmed the existence of the implied term of mutual trust and confidence in employment contacts (first established in *Courtaulds Northern Textiles Ltd v Andrew* 1979 IRLR 84, EAT), formulated as that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

50. A breach of the implied term of trust and confidence will amount to a fundamental (repudiatory) breach of contact (*Woods v WM Car Services (Peterborough) Ltd* 1981 ICR 666, EAT).

Resignation

51. A resignation is the termination of a contract of employment by the employee. When an employee resigns on notice, once given, the notice cannot be unilaterally withdrawn, and the contract will come to an end when the notice expires (*Brennan v C Lindley and Co Ltd* 1974 IRLR 153, NIRC).

52. If one party purports to terminate the contract without giving proper notice, this will amount to a repudiation of the contract, which must be accepted by the other party in order to bring the contract to an end (*Geys v Société Générale, London Branch* 2013 ICR 117, SC).

53. A resignation must signify the employee's genuine wish to terminate his/her employment contract, and will not be valid if procured by dishonesty, deception, or under duress.

54. In *Sheffield v Oxford Controls Co Ltd* [1979] ICR 396 Arnold J, having reviewed the previous case law on the question of "forced resignation" said:

> *"It is plain, we think, that there must exist a principle exemplified by the four cases to which we have referred, that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than dismissal. The cases do not in terms go further than that. We find the principle to be one of causation. In cases such as that we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the*

resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are ***satisfactory to him****, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign."(emphasis added)*

Variation of contract

55. It is trite law that parties to a contract can vary its terms by agreement. Such agreement, as well as it terms, can be expressed or implied.

56. As with the formation of a legally valid contact, the position in common law is that for a variation to be binding, it should be supported by consideration, in other words there must be some benefit passing from one party to the other. The traditional definition of consideration concentrates on the requirement that "*something of value*" (or "*money or money's worth*") must be given and accordingly states that consideration is either some detriment to the promisee (in that they may give value) or some benefit to the promisor (in that they may receive value). Although consideration need not be adequate, it must be "*of some value in the eye of the law*" (see - *Thomas v Thomas* (1842) 2 Q.B. 851, 859). Consideration may also be said to be lacking where it is clear that the promisee would have accomplished the act or forbearance anyway, even if the promise had not been made.

Implied terms

57. Contracts of employment (as other types of contacts) may, in addition to express terms, contain implied terms, i.e. terms that are not expressly set out in the contract itself (whether such contract is oral or written or a combination of both), but still are taken as having been agreed by the parties, either because they are too obvious to need recording, or because they are part of the custom and practice of the business or industry, or because they can be logically deduced from the conduct of the parties, or they are necessary to give "business efficacy" to the agreement as a whole.

58. Courts and tribunals should be slow to imply terms in a contract. In particular, terms cannot be implied if they will contradict express terms in the contract. They cannot be implied just because it appears to the court/tribunal that the term is reasonable or that the contract would be unfair without it. Furthermore, the court/tribunal can only look at the presumed intention of the parties at the time that the contract was made, not with the benefit of hindsight.

59. The implication of a term on the basis that the parties obviously intended it to apply, but omitted to spell it out, known as the "*officious bystander*" test, requires the court/tribunal to be satisfied that it was the parties' intention to have that term as part of the contract and they omitted to spell it out because it was so obvious that it went without saying. In *Shirlaw v Southern Foundries* (1926) Ltd 1939 2 KB 206, CA, the Court of Appeal said (subsequently affirmed by the House of Lords (Southern Foundries 1926 Ltd v

Shirlaw 1940 AC 701, HL)) that a term could be implied in a situation where '*if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"*.

60. A term can also be implied into a contract on the basis of how the parties operated the contract in practice, taking into account all the circumstances. However, as with other possible routes of implication, the focus must be on the parties' intentions at the time the contract was made.

61. The same principles apply when considering whether a term can be implied into an agreement that varies the terms of the existing (underlying) contact.

Analysis and Conclusions

62. To resolve this dispute, I must consider the following questions:

(i) Did the claimant resign on 5 July with immediate effect or on notice?
(ii) Was there a valid agreement between the claimant and the respondent to the effect that if the claimant resigned on notice, he would be allowed to serve his notice on garden leave and the disciplinary process against him would be discontinued (***"the resignation agreement"***)?
(iii) If so, what was the effect of the resignation agreement on the terms of the claimant's contract of employment with the respondent?
(iv) Did the claimant resign pursuant to the terms of the resignation agreement?
(v) If so, was the respondent in breach of the resignation agreement?
(vi) If so, was the respondent's breach fundamental?
(vii) If so, did the claimant resigned in response of the respondent's breach?
(viii) Did the claimant affirm the contract before resigning, thus losing the right to rely on the respondent's fundamental breach as constructive dismissal?
(ix) What is the legal effect of the claimant's email of 11 July 2023?

Question (i)

63. I have little difficulty in finding that the claimant's resignation on 5 July was not with immediate effect. It is obvious from reading his letter of resignation. His contract of employment required him to give 12-week notice, and that was what he did. Resigning on notice was discussed between him and SC on their 5 July call, hence SC putting in place arrangements for the claimant to go on garden leave. The fact that neither the claimant nor SC considered that the claimant was resigning with immediate effect is further shown by the SC's

edits of the AM's draft Resignation Acknowledgment email (see paragraphs 26 & 27 above).

64. However, and despite of that clear understanding, the respondent first attempted to treat the claimant's resignation letter as him resigning with immediate effect (see paragraphs 28-29 above). I find it had no proper basis for that. I cannot see anything in the claimant's contract of employment (and, in the course of the hearing, my attention was not drawn to any such provisions) to suggest that if an employee resigns in the circumstances when he or she is subject to the respondent's disciplinary process, such resignation is deemed to be with immediate effect.

65. AM in her witness statement (at para 1.16) refers to some "practice" she discussed with Mr Pete O'Rourke (HR Chief Operating Officer). However, her evidence is that the alleged practice is not to stop a disciplinary process with respect to employees on garden leave, rather than that if an employee resigns whilst being subject to the respondent's disciplinary process, he/she shall be deemed to have resigned with immediate effect. She says: *"Putting an end to the disciplinary process while SW remained on garden leave would be inconsistent with that, whereas a disciplinary investigation would naturally stop if SW resigned with immediate effect as he would no longer be an employee."* Therefore, all AM is saying there is that a disciplinary investigation would stop if an employee resigned with immediate effect, and not that resigning whilst being subject to a disciplinary process means resigning with immediate effect.

66. This attempt by the respondent to treat the claimant's 5 July resignation as being with immediate effect, in and of itself, will not have determined the outcome of this case. However, I find it is of some significance when I come to consider the overall conduct by the respondent in the context of the repudiatory breach question.

67. In short, the respondent presented no credible evidence on any sort to show that on 5 July the claimant resigned with immediate effect. Furthermore, it does not appear to be the respondent's pleaded case in the Grounds of Resistance (see paragraph 18). It is, therefore, quite surprising, to say the least, that in his closing submissions, Mr Boyle argued this point as being the respondent's primary case.

68. Accordingly, I find that the legal effect of the claimant's letter of 5 July 2023 was the claimant terminating his contract of employment with the respondent on notice to expire at the end of his 12-week notice period. During the currency of the notice his contract of employment, together with all its express and implied terms, remained in effect.

Questions (ii) &(iii)

69. Moving on to the next, and the key, question in this dispute – was there the resignation agreement, and if so, what were its terms and effect on the claimant's contract of employment with the respondent?

70. In their oral evidence, both the claimant and SC accepted that their mutual understanding at the time of discussing the claimant's four options was that if the claimant chose to resign, he would serve his notice on garden leave and be paid at the end of it. Both accepted in their evidence that ending the disciplinary process against the claimant upon his resignation was not specifically discussed. However, both say that it was their joint understanding. SC evidence in chief on this question is clear:
"As I had not been in a situation before where an employee resigns before the disciplinary hearing, I was not familiar with the process. I believe SW also misunderstood the process and believed that if he was placed on garden leave the disciplinary process would end. If someone hadn't gone through something like this before they wouldn't know how it works." *(emphasis added)*

71. It is not the respondent's case that whatever SC might have agreed with the claimant was of no legal effect, because, for example, SC did not have the requisite authority to bind the respondent into any such agreement with the claimant. Mr Boyle did not argue that the resignation agreement, if made, was not binding in law, for example, for want of consideration.

72. However, for completeness, I say that I find that the claimant and SC made the resignation agreement, which was binding in law on the respondent. Even if SC did not have actual authority to commit the respondent to it, there is little doubt in the way he positioned his discussions with the claimant that he, as the claimant's manager, had the necessary authority to negotiate with the claimant the terms of the claimant's departure from the company, hence the options SC gave to the claimant. Therefore, SC had what is known as ostensible authority to make the resignation agreement with the claimant.

73. I also find that the resignation agreement had all the necessary elements of a legally binding agreement (offer and acceptance, consideration, and intention to create legal relations). The claimant was offered four options by SC, - in realty only two: take your chances on disciplinary, or - resign. He accepted one of them. That was done in the business/employment context, and therefore the intention to create (or be more precise - to vary and then end) legal relations was clearly present. The claimant was forgoing the benefit of future employment with the respondent in return for being allowed to sit out his notice on garden leave and avoid the risk of a disciplinary dismissal. That is more than sufficient for consideration.

74. Crucially, I find that, although not expressly spelled out, the resignation agreement did contain the term to the effect that if the claimant decided to resign, he would be allowed to serve his notice on garden leave and the disciplinary process against him would be abandoned. Based on the

evidence before me, there is no doubt in my mind that it was common understanding between the claimant and SC at the time of them making the resignation agreement.

75. Furthermore, considering how the parties acted immediately after making the resignation agreement (putting the claimant on garden leave, SC sending the claimant an out of office notice to *"adjust the date range for say 6months*", SC saying to the claimant "*it is through now (resignation)*", and that is against the backdrop where the other option was to take your chances on disciplinary, clearly show that it was not contemplated by either side that the claimant would be expected to face a disciplinary hearing the following morning, which might (and indeed very likely) result in his immediate dismissal (*"Due to the FWW then dismissal"*).

76. I also find that this term was so obvious that there was no need for it to be spelled out in the resignation agreement. If it were contemplated by the parties that the resignation option would still come with "take your chances on disciplinary", it would not have been much of an option for the claimant. What would be the benefit for the claimant to resign and take his chances on disciplinary the following day, when he always could have taken his chances on disciplinary without resigning?

77. As I found earlier, it was the parties' joint understanding that the claimant was resigning on notice and not with immediate effect. Therefore, the respondent's argument that the claimant chose to resign on 5 July to avoid having to go through the disciplinary process and potentially being dismissed for gross misconduct falls on the facts. This argument contradicts direct evidence by SC and the fact that arrangements had been put in place by SC to make the claimant to serve out his notice on garden leave.

78. The fact that SC when making the resignation agreement with the claimant might not have known of the respondent's "practice" of not to stop disciplinary for employees on garden leave is irrelevant. He had made that agreement on behalf of the respondent and the respondent was bound by it.

79. The effect of the resignation agreement was to vary the terms of the claimant's contract of employment to the effect that in return for the claimant agreeing to resign on notice, the respondent agrees to allow the claimant to serve his notice on garden leave and to abandon the disciplinary process against the claimant.

Questions (iv), (v) & (vi)

80. The claimant clearly resigned pursuant to the agreed terms, thus keeping his side of the bargain.

81. The resignation agreement meant that it was no longer open to the respondent to continue with the disciplinary process against the claimant for

the alleged disciplinary offence, without putting itself in breach of the claimant's contract of employment.

82. It follows that by going back on the agreed terms:- first by purporting to treat the claimant's resignation as being with immediate effect (see paragraphs 64-66 above), and then by requiring the claimant to retract his 5 July resignation and resign with immediate effect or face the disciplinary hearing, which ultimately culminated in the claimant being presented with an ultimatum: either resign now or the disciplinary meeting on 12 July will (with or without you) go ahead, the respondent has committed a breach of the claimant's employment contract, as varied by the resignation agreement.

83. I find that the breach was fundamental (repudiatory) as it went to the core of the resignation agreement and essentially ripped it apart.

84. Additionally, I find that by acting in that way, the respondent has breached the implied duty of trust and confidence. Even if the respondent had the "practice" of not stopping disciplinary for employees on garden leave and even if it had good reasons to operate such a practice, in the light of the terms of the resignation agreement the respondent had made with the claimant, it no longer had "reasonable and proper cause" to conduct itself in that manner. The respondent's conduct undoubtedly had the effect of destroying (or at any rate – seriously damaging) the relationship of trust and confidence between the parties (see my findings of fact above).

85. Accordingly, the claimant is entitled to damages arising from the respondent's breach of his employment contract, as varied by the resignation agreement.

Questions (vii), (viii) & (ix)

86. This brings me to the final three questions, and principally - what is the legal effect of the claimant's email of 11 July? Did, by sending that email, the claimant resign from his employment with the respondent with immediate effect?

87. I find that the 11 July email did not have that effect, despite the respondent purported to treat it as such, or indeed, as resignation with retrospective effect, i.e. effective from 5 July 2023.

88. For the claimant to have validly resigned the second time, he would have had to retract his first resignation (the letter of 5 July), the respondent would have had to accept the retraction, and the claimant would have had to tender a fresh (second) resignation.

89. On a fair reading of the claimant's email of 11 July, I do not see how it can be taken as the claimant's retraction of his 5 July resignation letter when, on the contrary, he says that he wants the respondent to "*stand by [his] notice being handed in*" and goes on to reiterate his position about the resignation agreement he had made with SC.

90. I accept that the second part of the opening sentence ("*and employment with M&G ceasing as of 5th July*") implies that the claimant accepts that his employment with the respondent has ended on 5 July.

91. However, when read in the context of the entire email and against the relevant factual background, the true meaning of it, in my judgment, is the claimant accepting the respondent's breach of the resignation agreement (and hence his contract of employment), as ending his employment on that day. In other words, he accepts that by going back on the agreed terms of the resignation agreement, the respondent has repudiated his contract of employment and accepts the respondent's repudiatory breach as bringing his contract to an end on 5 July 2023.

92. Therefore, I find, that the 11 July email is not a fresh (second) resignation with immediate effect, but the notice accepting the respondent's repudiatory breach.

93. The claimant clearly did not wait to long before resigning, or in any other way indicated that he was affirming the contract, despite the respondent's fundamental breach of it.

94. However, if I am wrong on this, and the 11 July email is a fresh (second) resignation, I find that in law it amounts to forced resignation, and hence dismissal. To put it simply, the claimant was told either you resign immediately (and indeed not only immediately, but with retrospective effect) or face the disciplinary hearing the following morning, which, in all the circumstances, was most likely to result in his summary dismissal. That, in my view, is a classic example of forced resignation.

95. I reject Mr Boyle's submissions that it was the claimant's resignation at free will. What caused the claimant to "resign" was the threat of the likely dismissal at the next day's disciplinary hearing. He did not resign "*on the terms which he [had] negotiated and which [were] satisfactory to him*" (see paragraph 54 above).

96. For the same reason, the passage at [23] in the judgment in the case *Staffordshire County Council v Donovan* [1981] IRLR 108, EAT (Mr Boyle relies upon) does not assist the respondent.

> "*Now it is clear that this Appeal Tribunal has on a number of occasions said that if an employee is told 'Either resign or you will be dismissed' and the employee then chooses to resign under the threat of dismissal, that in reality is to be treated as a dismissal for the purposes of a claim under the 1978 Act. This present case, however, it seems to us that the proceedings were continuing subject to a right of appeal. In our judgment the majority clearly misdirected themselves as to the effect of the earlier cases and as to their analysis of the evidence. It seems to us that it would be most unfortunate if,* ***in a situation where parties are seeking to negotiate in the course of disciplinary proceedings and an agreed form of resignation is worked out by the parties****, one of the parties should be able to say subsequently that the fact that agreement was reached in the course of disciplinary proceedings entitles the employee thereafter to say that there was a dismissal. Accordingly we are satisfied here that there has been an error of law on the part of the majority. We consider that the Chairman was right in the conclusion to which he came*." (***emphasis added***)

97. In anything, it undermines the respondent's case. Having negotiated and agreed with the claimant "*in the course of disciplinary proceedings an agreed form of resignation*" (serve out your notice on garden leave and the disciplinary will stop), the respondent reneged on the agreed terms. Therefore, by analogy, this authority supports my conclusion that having made the resignation agreement with the claimant, it was no longer open for the respondent to force the claimant to resign with immediate effect or face the disciplinary hearing.

98. Finally, I reject Mr Boyle's submission that the claimant's email of 11 July had the effect of the claimant waiving his notice or pay in lieu. On the contrary, the claimant reiterates his position that the respondent has broken the resignation agreement. There is no express or implied waiver of his rights or remedies that can be sensibly found in his email. For completeness, Mr Boyle did not argue (and I was not the respondent's evidential case) that the respondent had the right to simply waive the claimant's notice, instead of placing him on garden leave.

99. Therefore, whichever way one looks at the facts, it was not a genuine resignation. It was either the claimant accepting the respondent's repudiatory breach, thus bringing his employment contract to an end, or it was forced resignation – in either case it was a dismissal without notice in breach of contract.

100. Consequently, the claimant is entitled to damages for breach of contract (wrongful dismissal).

Compensation

101. Having announced my decision on liability, I adjourned the hearing for each party to calculate compensation. Upon resumption of the hearing, the respondent gave the figure of £13,154.31, being the claimant's gross pay for 12-week notice period. The claimant accepted that figure.

102. I, accordingly, ordered the respondent to pay that amount to the claimant as damages for breach of contract.

Employment Judge Klimov

23 April 2024

Sent to the parties on:

9 May 2024

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For the Tribunals Office

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